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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-684

PACIFIC MARITIME ASSOCIATION and INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION and its LOCALS 13, 63, 10 and 34,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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Pursuant to Rule 24(5) and the requirements of this Court, petitioners hereby file this printed supplemental brief to its petition for certiorari filed on November 10, 1975. This printed supplemental brief is a verbatim repetition of the text of the letter sent by petitioners to the Court on January 21, 1976.

TEXT OF LETTER DATED JANUARY 21, 1976.

This letter is in the nature of a supplemental brief pursuant to Rule 24(5) with a request that the Court defer consideration of Petitioners' joint petition for certioriari filed on November 10, 1975. The reason for writing a letter rather than writing a formal brief or motion is that Petitioners understand that the Court's consideration of their petition for certiorari may be imminent. Therefore in the interest of bringing to the Court's attention certain new developments before a

decision on the petition has been reached, a letter format has been chosen.

The new development is the granting of an expedited appeal of the recent decision by the NLRB in *International Longshoremen's Ass'n (Consolidated Express, Inc.)* (December 4, 1975), 221 NLRB No. 144, 90 LRRM 1655. The case holds that provisions in a collective bargaining agreement between the International Longshoremen's Association and the New York Shipping Association assigning container loading and unloading work to longshoremen are invalid "hot cargo" provisions under Section 8(e). For the convenience of the Court a copy of the decision is attached to this letter.* The case has been appealed to the Second Circuit by the International Longshoremen's Association and the New York Shipping Association (Case No. 75-4266). Because of the importance of the case and the possibility of significant labor unrest on the New York waterfront the Second Circuit granted an expedited hearing procedure. Petitioner's briefs will be filed this Friday, January 23rd and the Respondent's briefs will be due on February 12, 1976. Counsel for the New York Shipping Association has informed Petitioners that he expects oral argument to occur sometime between late February and mid-March.

In view of the similarity of the facts between the instant case involving the assignment of container work on the West Coast and this new case involving the assignment of container work on the East Coast and the fact that the critical determinations by the NLRB are the same in both cases, Petitioners respectfully suggest to the Court that it would be appropriate

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*In this printed brief no copy has been attached.

to defer consideration of their petition for certiorari until the Second Circuit has handed down a decision. Such deferral would be appropriate not only because it is imperative that the legal standards governing the performance of container work be the same on both coasts, but also because a deferral of the instant petition will not prejudice any party or person. Petitioners have not and are not now enforcing the collective bargaining provisions which have been held invalid by the NLRB. Thus a delay can have no effect on the NLRB, the Intervenors, or any other person.

That the two cases are strikingly similar and in many respects identical is apparent from even a cursory reading of the decisions. Thus the Board has held in both cases that the traditional work of longshoremen is confined to the mere loading and unloading of ships and does not extend to the preparing and sorting of break bulk cargo before loading and after unloading. The effect of such a holding is to foreclose application of the "work recapture" doctrine set forth in *American Boiler Manufacturers Assn. v. NLRB* (8th Cir. 1968), 404 F.2d 547, *cert. den.*, 398 U.S. 960 (1970) and the applicability of this doctrine is one of the main points urged in the petition for certiorari before this Court.

In both cases the Board viewed the disputed work from a fallacious geographical perspective. Thus both decisions considered the disputed work to be the loading and unloading of containers at off dock stations by nonlongshoremen and concluded that therefore longshoremen to not have a traditional history of doing the disputed work at those locations (although longshoremen have done all such work on the dock).

In both cases the petitioners have urged that this is an improper formulation of the disputed work because it means that almost every agreement involving work assignment clauses would be invalid since work preservation agreements usually come into being because others have begun to do the same work elsewhere. The disputed work should be regarded as simply the loading and unloading of containers just as in *National Woodwork Mfg. Ass'n. v. NLRB* (1967), 386 U.S. 612 the work in dispute was the preparation of blank doors in general and not the preparation of doors at a particular manufacturer's plant.

The Board in both decisions also improperly rested its determination on what Petitioners have termed in their prior briefs as the "effect on others" standard. Thus the Board in the West Coast case said that although the union and employer had not attempted to require the assignment of shippers loads (approximately 85% of all containers) to the bargaining unit, they in the future could claim such work and such a claim would have an "erroneous impact" on the shipping industry. Therefore the claim to the lesser work was unlawful. The identical erroneous reasoning was applied in the East Coast case.

There is a substantial chance that the Second Circuit will not sustain the Board's approach since the Second Circuit has already ruled in context of an antitrust case that some of the same collective bargaining clauses in issue before the NLRB were lawful work preservation clauses. *International Container Transport Corporation v. New York Shipping Ass'n.* (2d Cir. 1970), 426 F.2d 884. Moreover, in a district court decision brought to the Court's attention in Petitioners' supplemental

brief, *Humphrey v. International Longshoremen's Ass'n.* (E.D. Va. 1975), ... F.Supp. ...., 90 LRRM 2838, Judge Merhige decided that collective bargaining provisions similar to those on appeal before the Second Circuit could not be enjoined under Section 10(1) because the Regional Director had not even presented cause to believe that a violation of Section 8(e) had occurred.

Petitioners have kept this letter brief in order to bring this new development to the Court's attention immediately. If the Court would wish to have further briefing on the matter, Petitioners would, of course, be willing to provide such briefing.

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